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Supreme Court of the United States

October Term, 1956

No. 29-4

CLAUDE MACK LIGHTFOOT,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

JOHN J. ABT,
11 Park Place,
New York 7, N. Y.,

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October Term, 1956

No. 32

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THE UNITED STATES OF AMERICA,

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REPLY BRIEF FOR PETITIONER

I. The Insufficiency of the Evidence.

We showed in our principal brief that although the evidence spanned nineteen years of petitioner's membership in the Communist Party and established that he had taught in many Communist Party schools, participated in a long series of Communist Party meetings and conventions, engaged in innumerable private conversations with or in the presence of prosecution witnesses, and written extensively on the subject of Communism, the respondent could produce no evidence that he had ever said, written or done anything to advocate the violent overthrow of the government or to manifest an opinion or belief that the Communist Party engaged in such advocacy. Much less was there evidence that petitioner personally intended to bring about the violent overthrow of the government "as soon as circumstances would permit" or at any other time (Pet. Br. 8-13, 31-34, 41-43).

Respondent's counter-statement of the evidence concerning the petitioner's own acts and declarations, in the main,

confirms our assertion. Respondent, however, resorts to three devices in an attempt to squeeze evidence of guilt from a barren record.

First, respondent presents a doctored version of the Brzek "bloodshed" story upon which it heavily relies. It says that in the Ivanhoe School lecture which was the subject of Brzek's testimony, petitioner "discussed the necessity of using bloodshed to obtain the objectives of the Party", and "because bloodshed is a pre-condition of the successful revolution, he emphasized that bloodshed was on the agenda" (Respt. Br. 16). These damaging words were not those of the witness (R. 461-62). but have been supplied by the respondent.[1] Our principal brief demonstrated that, if intelligible and credible, the Brzek testimony, far from establishing that petitioner advocated violence for any purpose, shows that he urged its avoidance (Pet. Br. 33-34). Unable to counter our analysis, respondent adopts the expedient of misstating the testimony.

Second, respondent excises two articles written by the petitioner to give them a significance which the full texts negative. Thus, respondent documents its statement that petitioner urged use of "the most effective tactics in effecting the ultimate aims of Marxism Leninism" with an excerpt from a 1951 article in which petitioner recalled that the Communist Party of the Soviet Union took power eight months after emerging from illegality and that the Communist Parties of Italy and France won leadership of the working class of those countries in the underground partisan movement (Respt. Br. 20). But respondent suppresses the paragraphs of the article which immediately follow this statement (G. Ex. 54, p. 7):[2] .

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[1] Respondent indulges in another and similar distortion of the Brzek testimony in the appendix to its brief (Respt. Br. 59).

[2] These paragraphs are not included in the printed rceord but appear in the exhibit which is a part of the record in the court below. Petitioner quoted them in his reply brief below (p. 3).

> "*I do not want to draw any mechanical comparisons*, but the fact remains that history shows that Communist Parties can expand their ties with the people even under the most extreme terror and persecution by the enemy.
>
> "We do not yet have fascism in America, although there are strong tendencies in that direction. And if our brother parties were able, under conditions of outright fascism, *to master the problem of work among the people, then our Party in the United States can undoubtedly do likewise* under relatively more favorable circumstances." (Emphasis supplied.)

Again, respondent quotes a paragraph from a second article by petitioner in which he wrote, "We cannot carry out these responsibilities unless we achieve a greater knowledge of Marxist-Leninist and Stalinist teachings on the National Question" (Respt. Br. 20). The nature of the "responsibilities" to which petitioner referred does not appear from respondent's excerpt but, as in the previous instance, respondent would have the Court believe that they relate to "effecting the ultimate aims of Marxism-Leninism" (*ibid.*). However, as is made plain by the sentence which immediately precedes the portion of the article quoted by respondent, petitioner was discussing "responsibilities" of an entirely different character. For he wrote, "If the working class in general must be won for Negro-white unity, then our Party has a great responsibility" (R. 375).

Third, respondent documents its charge that petitioner engaged in sinister activities by references either to the foregoing distortions in its statement of the evidence or to conduct which is patently innocent. Thus, respondent asserts that petitioner "repeatedly endorsed and enjoined upon others the Party principles of military discipline and preparation for violence" (Respt. Br. 31). For the documentation of this assertion, respondent refers the Court:

(1) to respondent's embroidered version of the Brzek testimony (Respt. Br. 14-16); (2) to respondent's excision of the two articles of petitioner discussed above (Respt. Br. 20); (3) to two speeches in which petitioner is alleged to have said that the Russian Revolution succeeded "under the wise leadership of Lenin and Stalin" (Respt. Br. 13, 18);[3] (4) to a speech in which petitioner likened the Communists to David and their enemies to Goliath (Respt. Br. 19), and (5) to the fact that at the conclusion of a meeting petitioner asked those present to rise and sing the Internationale (*ibid.*). Surely, neither the distortions nor the trivialities can substitute for proof.

Our principal brief showed not only that the prosecution had failed to prove guilty knowledge or intent, but that the uncontradicted evidence (including the testimony of respondent's own "expert") conclusively establishes, for the purpose of this case, that the Communist Party advocated a peaceful path to socialism, and hence affirmatively demonstrates that petitioner is innocent (Pet. Br. 35-37).[4]

Respondent devotes an appendix to its brief to an attempted demonstration that the evidence establishes that

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[3] Respondent misstates the testimony concerning one of these speeches by attributing to petitioner the nonsensical statement that, "here in this country the revolutionary movement had not succeeded" in 1917-1921 (Respt. Br. 13). What the witness in fact quoted petitioner as saying was that in 1917-1921 "the revolutionary movement did not succeed in all movements [sic]," obviously referring to countries like Hungary where an attempted revolution was defeated (Pet. Br. 93; R. 348).

[4] Respondent urges that courts on other records in other Smith Act cases have found that the Communist Party engaged in the proscribed advocacy. But *this* case must be decided on *this* record. Cf. *Fiske* v. *Kansas*, 274 U. S. 380 and *Burns* v. *United States*, 274 U. S. 328, where the Court, at the same term, reached mutually contrary conclusions concerning the advocacy of the I.W.W. because of differences in the character of the evidence offered in the two cases.

the Communist Party advocated proscribed doctrine. An examination of this appendix shows that, apart from quotations from the works of Lenin and Stalin written thirty or more years ago (Respt. Br. 51-54) and the embroidered version of Brzek's tale which we have already disposed of (Respt. Br. 59), there is only one reference to force or violence in the entire document. This is contained in a statement attributed to Lautner that "strategy is always directed toward the forcible overthrow and destruction of the present 'Imperialist' Government and its replacement by the 'dictatorship of the proletariat'" (Respt. Br. 56). The attribution of this statement to Lautner is a pure invention of respondent, as its own documentation (R. 296-99) reveals. What Lautner said—and all that he said—in defining what Communists mean by "strategy" was that it "is to muster those forces in society that will bring about a fundamental change in society in relation to the economic structure and the upper structures in society" (R. 297).

This is a far cry from advocating force and violence. It is perfectly consistent with the testimony of the same witness that the Communist Party advocated a peaceful advance to socialism by elections and parliamentary methods, and foresaw the possibility of violence only if the trusts and monopolies resorted to violent means to prevent effectuation of the popular will (Pet. Br. 35-36; R. 281).

The foregoing analysis of respondent's presentation of the evidence confirms the thesis of our principal brief (pp. 7-8, 34-35) that the case against petitioner rests on nothing but an elaborate and tenuous series of inferences from respondent's interpretation of the teachings of the "classical" Communist literature. As we have shown (Pet. Br. 34-37), these inferences are flatly refuted by Lautner's acknowledgment that the advocacy of the Communist Party was peaceable and by the constitution of the organization and Foster's *History* which contain the

only statements in the entire record by the American Communist Party, its leaders or members, concerning the means advocated for the achievement of socialism in this country.

We further showed (Pet. Br. 37-41) that even had there been no countervailing evidence, petitioner could not be deprived of his liberty on the basis of the specious deductive logic which is all that respondent can adduce against him. *Schneiderman* v. *United States*, 320 U. S. 118, decided this issue squarely against respondent.

Having no answer to *Schneiderman*, respondent discreetly ignores its existence. However, respondent's own statement of the grounds upon which *Herndon* v. *Lowry*, 301 U. S. 242, was decided (Scales Br. 44, n. 26)[5] demonstrates that petitioner cannot constitutionally be convicted on the evidence in this record. The evidence against Herndon went beyond that offered here. For in addition to showing his membership and extensive activity in the Communist Party, it established his possession of a current document issued by the organization which the Court found might be said to advocate revolutionary violence at some future time. But the Court refused to impute this advocacy to the defendant and, as respondent points out (*ibid.*), reversed the conviction for lack of proof that the defendant "had urged or even approved those of the Party's aims which were unlawful."

II. The Unconstitutionality of the Statute.

A. Face Invalidity.[6]

Respondent makes no attempt to defend the membership clause as written. Instead it re-writes the clause and urges the constitutionality of a non-existent law. Respondent's

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[5] We so designate respondent's brief in *Scales* v. *United States*, No. 29, this Term.

[6] Respondent's discussion of this issue is contained in its brief in *Scales* v. *United States*, *supra*.

hypothetical statute differs from the one which Congress enacted in two vital respects.

First, respondent amends the membership clause by making the specific intent to overthrow the government "as speedily as circumstances will permit" an element of the offense (Scales Br. 39-41). Respondent ignores our demonstration, from a comparison of the advocacy, organizing and literature distribution provisions of the Smith Act with the membership clause, that the omission of intent from the latter was deliberate (Pet. Br. 47-48). It concedes (Scales Br. 40) that, as we showed (Pet. Br. 46-47), the nexus between act and intent which led the Court in *Dennis* v. *United States*, 341 U. S. 494, 499, to import a specific intent into the advocacy and organizing provisions of the Act does not exist in the case of the membership clause. But it dismisses this decisive difference and the principle that criminal statutes must be strictly construed as "a perverse insistence on finding constitutional infirmities" (Scales Br. 40). But epithet is no substitute for analysis, and respondent offers no better reason for its position than a desire to sustain the statute.

Second, respondent surrounds the term "member" with a long series of characterizations and qualifications entirely alien to the well understood meaning of this familiar term.[7] Thus, the membership must be "active", entailing "rigidly disciplined adherence to and labors for the organization's unlawful objectives", and "tightly disciplined, quasi-military, deeply conspiratorial activities" (Scales Br. 41, 45). Of course, there is not the slightest warrant for such a reading, and respondent tacitly acknowledges that, without it, the statute is invalid because it imputes guilt solely from association, unaccompanied by any overt act of wrong-

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[7] "A person considered in relation to any aggregate of individuals to which he belongs." Webster, *International Dictionary*.

doing, and violates the clear and present danger test (Pet. Br. 49-53, 54-56).[8]

Furthermore, respondent's thesis requires the Court to usurp the function of the jury as well as that of Congress. For if "membership" connotes all that respondent now claims for the term, petitioner was entitled to have the jury determine, under appropriate instructions, whether he was a member of the peculiar kind respondent now says the statute punishes. Thus, even if respondent's esoteric conception of "membership" could somehow find acceptance, a reversal of the conviction would still be necessary.

We turn to respondent's discussion of the authorities.

Respondent leans heavily on Mr. Justice Jackson's characterization of the Communist Party in his partial concurrence in *American Communications Association* v. *Douds*, 339 U. S. 382, 422 (Scales Br. 36, 42). But it ignores those portions of the same opinion (at 434) which demonstrate

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[8] Similarly, respondent urges the reasonableness of its hypothetical statute instead of addressing itself to the membership clause as enacted. Respondent depicts the dangers, during an atomic war, from "highly disciplined, tightly organized adherents whose doctrines are ideologically attuned to the aggressor nation and who have been located in key positions for revolutionary purposes," are adept at "infiltration into strategic places," and have demonstrated "readiness to aid a foreign power" (Scales Br. 38). These considerations might well be pertinent to the validity of statutes condemning treason, sabotage, conspiracies to overthrow the government and the like. But they cannot justify the membership clause which requires no proof of conduct of the sort respondent so luridly describes or, indeed, of any conduct whatsoever beyond the bare act of association. The fact is, as Professor Chaffee has written, that, "The provisions of section 2 [of the Smith Act] never received a favorable report from any committee of the Seventy-Sixth Congress that had subjected them to the test of a public hearing. Not a spark of evidence was introduced in Committee or in Congress to show any more need for such a federal statute now than in 1920. No proof was offered of any evil which had to be remedied by the unprecedented provisions of section 2." *Free Speech in the United States* (1946 ed.), p. 463.

that, despite the author's bitter hostility to Communism, he regarded legislation which prohibits an individual from being or becoming "a full fledged member of the Party" and "engaging in above board political activity" as unconstitutional. Likewise ignored is the majority opinion in *Douds* which, as we showed in our principal brief (pp. 52-53), similarly foreshadowed the invalidity of the membership clause.

Respondent's own statement of *Herndon* v. *Lowry* demonstrates that it is controlling here (Scales Br. 44, n. 26). For the membership clause, like the Georgia statute, requires no proof that the accused "urged or even approved those of the Party's aims which were unlawful."

Respondent reads *De Jonge* v. *Oregon*, 299 U. S. 353, too narrowly (Scales Br. 44, n. 26). The decision did not turn on the fact that the statute reached persons who were not members of the Communist Party. For Mr. Justice Hughes explicitly stated (at 365) that,

> "The question, if the rights of free speech and peaceable assembly are to be preserved, is * * * not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."

Thus, the essence of the decision (reiterated in *Herndon*) is that men may not be punished for their relations or association with a "bad" organization, but only for their own personal acts of wrongdoing.

Respondent seems to rely on the majority opinion in *Whitney* v. *California*, 274 U. S. 357, for the proposition that the offense defined in the membership clause "partakes of the nature of a conspiracy" and is punishable as such (Scales Br. 46). But Mr. Justice Sanford was speaking of the *organizing*, not the membership provision of the California statute in the passage which respondent quotes.

This reading is clear from the opinion and was adopted by the Court in *De Jonge* (at 363) where the *Whitney* decision was described as one in which "the defendant was found guilty of wilfully and deliberately assisting in the forming of an organization for the purpose of carrying on a revolutionary class struggle by criminal methods." Moreover, Mr. Justice Brandeis' weighty concurrence (at 372-73) characterizes both the organizing and membership provisions of the statute as creating "a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly."

B. Application.

Respondent concedes that there was no evidence that petitioner engaged in the advocacy of violence during the three years' preceding the indictment, and its own summary of his conduct during that period shows nothing but peaceable activity and constitutionally protected expression (Respt. Br. 36).[9] Nevertheless, respondent urges that petitioner may lawfully be convicted because the activities of the organization to which he belonged presented a clear and present danger (Respt. Br. 36-37).

Respondent misconceives the nature of the issue under the clear and present danger test as applied to the membership clause. The fact—if it had been established—that the organization engaged in advocacy creative of a danger [10] would be relevant to the constitutional application of a statute punishing the organization. But the membership clause punishes individuals, not organizations. The issue here, therefore, is whether the conduct *of petitioner* gave rise to a danger. The mere fact of his membership and officership, unaccompanied by illegal advocacy or by

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[9] As we have shown, petitioner's conduct in prior years was similarly devoid of illicit acts or advocacy.

[10] As we have seen, upon the evidence in this record, the advocacy of the Communist Party was as innocent as that of petitioner.

conduct which amounts to aiding and abetting the criminal purpose of the organization cannot be dangerous under any circumstances. This is the essence of the decisions in the *De Jonge* and *Herndon* cases and of Mr. Justice Brandeis' concurrence in *Whitney*.

Respondent begrudgingly concedes that at and since the time of the indictment there has been a relaxation of international tensions and a hopeful outlook for the preservation of peace (Rospt. Br. 37). Respondent's reliance on the reference to the Korean War in *United States* v. *Flynn*, 216 F. 2d 354, 367, quoted in our principal brief (p. 58, n. 38), is therefore faulty. For, as we have shown (Pet. Br. 57, 58) it is the international setting existing at the date when the indictment was returned which must be considered in determining whether the conduct of the petitioner gave rise to a danger.

III. The Failure of the Trial Court to Inspect Brzek's Report to the F.B.I.

It is only necessary to add to what was said in our principal brief (pp. 61-66) that the Solicitor General's motion to remand in *Mesarosh* v. *United States*, No. 20, this Term, serves to emphasize that trial court inspection of the relevant reports of F. B. I. informers is a minimum precaution required to safeguard the administration of justice against the use of tainted testimony.

IV. The Erroneous Admission of Evidence.

A. The Lautner Testimony.

As we understand respondent's contention (Respt. Br. 42), it is that the prosecution may separate its evidence as to guilty knowledge into two air-tight compartments. Compartment A is for evidence that petitioner had the opportunity or occasion to become familiar with the purposes of the organization, irrespective of "what those purposes actually

were." Compartment B is for evidence, wholly unconnected with petitioner, that in fact one of the purposes of the organization was criminal. Respondent seems to argue that the evidence in compartment B is relevant because, coupled with the evidence in compartment A, it raises an inference that petitioner had knowledge of the criminal purpose.

Respondent's contention is fallacious. The knowledge with which the statute is concerned is not that of some simple physical condition like the weather, evidence of mere exposure to which gives rise to an inference that the accused knew it was bad. Petitioner could acquire knowledge that one of the purposes of the organization was illegal only by hearing or reading a statement to that effect by or on behalf of the organization. The fact that Lautner might have concluded from his own personal experience, not shared by petitioner, that the organization had a bad purpose [11] would not have the slightest tendency to prove that petitioner must have reached the same conclusion from his different experience.[12]

Respondent argues that the Lautner testimony was competent because, "The question was not whether these doctrines and purposes were 'true,' but what they were" (Respt. Br. 42). Respondent misstates the question. The issue was not what the purposes were, but whether petitioner *knew* what they were. On that issue, the statements or opinions of third parties, uncommunicated to petitioner, were plainly incompetent as hearsay.

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[11] Although Lautner did not so testify, his testimony was prejudicial nonetheless (Pet. Br. 70-71).

[12] Respondent makes the preposterous suggestion that Lautner's opinion testimony was relevant because of the "close parallel between his career in the Party and petitioner's" (Respt. Br. 41).

B. The Meyer Testimony.

It is true as respondent says (Respt. Br. 43) that a small portion of Meyer's testimony related to events subsequent to the enactment of the Smith Act. But the crucial and damaging portion of his testimony which laid the foundation for the introduction of the "classics" related to conversations with petitioner prior to the passage of the Act (see Pet. Br. 71-72). Respondent relies on *United States* v. *Dennis*, 183 F. 2d 201, for the admissibility of this testimony (Respt. Br. 44). But it disregards *Kammann* v. *United States*, 259 F. 192, which is controlling here as well as the fact that the Court in *Dennis* expressed its agreement with the holding in that case (see Pet. Br. 72-73).

C. The "Classical" Literature.

Respondent argues that there was a foundation for the introduction of the excerpts from the "classics" apart from the testimony of Meyer and Lautner (Respt. Br. 45). But since Meyer supplied the only evidence that petitioner was familiar with the excerpts offered in evidence (Pet. Br. 74), his testimony alone established their competence.

We urged in our principal brief (p. 74) that the excerpts should have been excluded as irrelevant because there was no evidence as to how petitioner (or for that matter, the Communist Party) interpreted or taught from them or what he (or it) believed their application to be to current conditions in the United States. Respondent points out that the same writings were admitted in the *Schneiderman* case, *supra*. In *Schneiderman*, however, not only does there appear to have been no objection to the admission of the writings, but Schneiderman himself introduced expert testimony with reference to them. See, *Schneiderman* v. *United States*, *supra*, at 129.

V. The Erroneous Instruction that the Teaching and Advocacy Alleged in the Indictment Refers to that of the Communist Party as an Entity and not to that of Its Members Individually.

Contrary to respondent's suggestion (Respt. Br. 47), conspiracies to violate the organizing and advocacy provisions of the Smith Act are not affected by the literal reading of the membership clause for which petitioner contends. The advocacy provision requires proof of advocacy (or a conspiracy to advocate) by the defendants themselves, so that the question whether a substantial number of the members of the Communist Party individually engaged in the proscribed advocacy does not arise. And where the charge is for conspiracy to organize, it is the nature of the *agreement* among the defendants that is determinative and not whether, in fact, members of the organization advocated prescribed doctrine, personally or vicariously.

The fact that brief and uninformative committee reports, obviously prepared in haste, used an inaccurate short-hand expression to describe the provisions of the membership clause (Respt. Br. 47-48) carries no weight in the light of the plain terms of the statute and the provisions of other legislation in *pari materia* with the membership clause (see Pet. Br. 75-76).

VI. The Effect of Section 4(f) of the Internal Security Act.[13]

Respondent concedes that the reference in Section 4(f) to "any other criminal statute" was drafted with the Smith Act in mind (Scales Br. 54). The question that remains is: What did Congress have in mind with respect to that Act? As we showed in our principal brief (pp. 77-80) the answer is supplied by logic and the legislative history. Both establish that Congress believed that the privilege against self-incrimination precluded the compulsory registration of Communist Party members so long as they remained subject to prosecution under the membership clause. Accordingly, in order to make registration enforceable, Congress immunized Communist Party members, whose only overt act was that of membership, from prosecution under the Smith Act.

Respondent attempts a different answer. It says that the reference to "any other criminal statute" was intended only as an aid to interpretation of the membership clause, *i.e.*, as a kind of warning to the courts against the conviction of Communist Party members without proof of guilty knowledge (Scales Br. 54-55).

Respondent's answer wars with logic. The courts were in no need of an interpretive guide to the membership clause. Its terms are simple and state as plainly as words can that knowledge of the proscribed purpose is an element of the offense. Moreover, respondent's answer contradicts the legislative history. For the members of Congress who were responsible for writing the reference to "any other criminal statute" into Section 4(f) did not urge this phrase as an aid to the interpretation of the Smith Act. Instead, they said clearly and explicity that immunity from prosecution under the membership clause was necessary to make

[13] Respondent's discussion of this issue and of the effect of the findings of the Communist Control Act on petitioner's right to a fair trial is contained in its brief in the *Scales* case, *supra*.

registration enforceable against members of the Communist Party (Pet. Br. 79-80).

Respondent misstates the effect of the Humphrey amendment to the Communist Control Act when its says that in defeating it, "Congress merely refrained from imposing a criminal sanction on membership alone" (Scales Br. 56, n. 29). The criminal sanction of the Humphrey amendment was not on "membership alone," but only on membership accompanied by knowledge of the Communist Party's alleged criminal purpose—the same offense charged in the indictment here (see Pet. Br. 81).

VII. The Effect of the Findings of the Communist Control Act.

We wish only to correct what may be a false impression from respondent's brief in *Scales* (p. 77) that petitioner raised this issue for the first time in this Court. In fact, he raised it by motion to dismiss the indictment (R. 7) and reasserted it in the Court of Appeals (R. 632).

Respectfully submitted,

JOHN J. ABT,
11 Park Place,
New York 7, N. Y.,
Attorney for Petitioner.